

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0496
Sales and Use Tax
For The Tax Years 2001-2003

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax – Unitary Transactions.

Authority: IC § 6-8.1-5-1(b); IC § 6-2.5-2-1(a); IC § 6-2.5-3-2(a); IC § 6-2.5-1-1(a); *Indiana Department of State Revenue v. Interstate Warehousing*, 783 N.E.2d 248 (Ind. 2003).

The Taxpayer protests the tax assessment on unitary transactions.

II. Sales and Use Tax – Sales Taxes Paid by Customer.

Authority: IC § 6-2.5-2-1(b).

The Taxpayer protests the assessment of sales tax on sales to a particular customer who paid the taxes.

III. Sales and Use Tax – Property Delivered to Illinois.

Authority: IC § 6-2.5-2-1(a).

The Taxpayer protests the assessment of sales tax on property delivered to Illinois.

IV. Sales and Use Tax – Sale to Bankrupt Customer.

Authority: IC § 6-2.5-2-1(a); IC § 6-2.5-4-1(b).

The Taxpayer protests the assessment of sales tax on property sold to a bankrupt customer.

V. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b)(c).

The Taxpayer protests the imposition of the negligence penalty.

STATEMENT OF FACTS

The Taxpayer produces and installs signage. After an audit, the Indiana Department of Revenue (Department) assessed additional sales and use tax, penalty, and interest for the tax period 2003-2005. The Taxpayer protested a portion of the assessments and the penalty. A hearing was held and this Letter of Findings results.

ISSUES

I. Sales and Use Tax – Unitary Transaction.

DISCUSSION

The Taxpayer's business has two aspects. The Taxpayer produces signage. The Taxpayer also installs and repairs signage. The Department assessed sales tax on the total value of the contracts for the Taxpayer's sales of signage to customers. The Taxpayer protested the assessment of sales tax on the labor portions of these contracts.

All tax assessments are presumed to be valid. IC § 6-8.1-5-1(b). The Taxpayer bears the burden of proving that any assessment is incorrect. *Id.* Exemption statutes are to be strictly construed against the Taxpayer. *Indiana Department of State Revenue v. Interstate Warehousing*, 783 N.E.2d 248 (Ind. 2003).

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-3-2(a) imposes use tax on the storage, use or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction as defined for sales tax purposes. The provision of services is not the transfer of tangible personal property. Therefore, services are not subject to the imposition of the sales and use tax unless the law specifically defines the provision of the particular services as a taxable retail transaction. A "unitary transaction" is defined at IC § 6-2.5-1-1(a) as follows:

"[U]nitary transaction" includes all items of personal property and services which are furnished under a single order or agreement and for which a total combined charge or price is calculated.

Pursuant to this statutory definition, services are subject to the sales and use tax when they are provided in conjunction with personal property as a unitary transaction. In order to establish that the sales transactions were not unitary, the Taxpayer produced invoices and contracts for its sales of signage. Most of the contracts used terms such as "furnish and install," "complete install," "fabricate and install," and "furnish the materials and perform labor necessary" to describe the Taxpayer's responsibilities under the contracts. The words "furnish," "complete," and "fabricate" indicate that the Taxpayer was selling personal property – the signage. The word "install" indicates that the Taxpayer was providing the service of installation. The majority of the contracts had a single price listed for the contracted work. Under these contracts, the Taxpayer had the responsibility to provide property and service for a single price. The contracts

represented unitary transactions subject to the sales tax. The Taxpayer failed to sustain its burden of proving that the service portion of most of the contracts qualified for exemption from the sales tax.

Sixteen of the submitted contracts had provisions specifically setting out the costs of labor for at least a portion of the contract price. Services, such as the provision of labor, that are separately stated and billed are not subject to the sales or use tax as part of a unitary transaction. The Taxpayer sustained its burden of proving that the separately stated labor and installation charges in these contracts are exempt from the sales tax.

FINDING

The Taxpayer's protest to the sales tax assessed on separately stated service charges for invoice numbers 2860, 3075, 4865, 4059, 4062, 4354, 4765, 3806, 4866, 6270, 6817, 6227, 6032, 6639, 6669, m103 is sustained. The remainder of the protest is respectfully denied.

II. Sales and Use Tax – Sales Taxes Paid by Customer.

DISCUSSION

The Taxpayer protested the assessment of sales tax on the sale of signage to a particular customer. As the person who acquired the property, the customer was the proper person to pay the sales tax. IC § 6-2.5-2-1(b). The Taxpayer argued that after an audit the customer had paid all of the sales tax on the purchases directly to the state. The Taxpayer sustained its burden of proving that the customer remitted the sales taxes to the Department after the audit of the customer's business. The Taxpayer is not liable for the sales tax on these transactions.

FINDING

The Taxpayer's protest to the assessment of sales tax on sales to the customer highlighted in pink on the Taxpayer's "Tax Breakdown" spreadsheets is sustained.

III. Sales and Use Tax – Property Delivered to Illinois.

DISCUSSION

The Taxpayer protests the assessment of sales tax on a sign delivered to Illinois. Sales tax is imposed on retail sales that take place in Indiana. IC § 6-2.5-2-1(a). The Taxpayer argued that since the sign was delivered to Illinois, the sale took place in Illinois. As a sale in Illinois, the Taxpayer argued that the transfer was not subject to Indiana sales tax. To support this argument, the Taxpayer submitted an invoice showing that the sign was delivered to Illinois. It is unclear as to whether the sale of the sign was negotiated and consummated in Indiana. There is no evidence that the purchaser paid Illinois use tax on the sign. The Taxpayer did not sustain its

burden of proving that the sale took place in Illinois rather than Indiana. Therefore, the transaction is subject to the Indiana sales tax.

FINDING

The Taxpayer's protest is respectfully denied.

IV. Sales and Use Tax – Sale to Bankrupt Customer.

DISCUSSION

The Taxpayer protests the assessment of sales tax on a sale to a bankrupt customer. Indiana imposes a sales tax on retail sales. IC § 6-2.5-2-1(a). A retail sale is the transfer of property for consideration in the ordinary course of the seller's business. IC § 6-2.5-4-1(b). The Taxpayer argues that since the customer declared bankruptcy, there was no consideration paid. Therefore no retail sale on which to impose the sales tax took place. The invoice and contract submitted by the Taxpayer indicate that a sale took place. The Taxpayer did not submit any documentation indicating that the customer declared bankruptcy and therefore no consideration was paid. The Taxpayer did not sustain its burden of proving that the sales tax was improperly imposed.

FINDING

The Taxpayer's protest is respectfully denied.

V. Tax Administration – Negligence Penalty.

DISCUSSION

The Taxpayer protests the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay

the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The Taxpayer provided substantial documentation to indicate that its failure to pay the assessed tax was due to reasonable cause rather than negligence.

FINDING

The Taxpayer's protest to the imposition of the penalty is sustained.